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No. 80-1005

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

LANCE LOUIS SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Congress clearly intended that a criminal defendant who forcibly enters a post office, then immediately takes government property therefrom, then immediately assists in the removal of that property away from the post office, and later that property is transported interstate by another without the defendant's knowledge can be convicted of, and consecutively sentenced under, 18 U.S.C. § 2115 (post office burglary), 18 U.S.C. § 641 (theft of government property) and 18 U.S.C. § 2314 (interstate transportation of stolen property).

II.

Whether the prosecutor's repeated violations of the trial court's rulings by deliberately introducing evidence which violated the *Bruton* rule conflicted with decisions of this Court and the Fifth Circuit and denied petitioner due process of law.

TABLE OF CONTENTS

	Page
Questions presented for review	i
Statement of the case	2
Statutes involved	3
Reasons for granting the writ	5
1. The ruling of the court below that petitioner could stand convicted and consecutively punished for post office burglary, theft of property from inside that post office and interstate transportation of that property conflicts with decisions of this Court which hold that appellate courts must determine whether Congress intended to subject a defendant to multiple prosecutions for a single criminal transaction and, where there is an ambiguity, must resolve doubt in favor of lenity	5
2. The prosecutor's repeated violation of the trial court's rulings by deliberately introducing evidence which violated the Bruton rule conflicts with decisions of this Court and the Fifth Circuit and denied petitioner due process of law	9
Conclusion	12

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TABLE OF AUTHORITIES CITED

Cases

	Page
Bell v. United States, 349 U.S. 81 (1955)	8
Berger v. United States, 295 U.S. 78 (1935)	12
Bruton v. United States, 391 U.S. 138, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)	i, 9
Giglio v. United States, 450 U.S. 150 (1972)	11, 12
Ladner v. United States, 358 U.S. 169 (1958)	8
Mooney v. Holohan, 294 U.S. 103 (1935)	11
Morgan v. Devine, 237 U.S. 632 (1915)	6, 7
Napue v. Illinois, 360 U.S. 264 (1959)	11
Pyle v. Kansas, 317 U.S. 213 (1942)	11
Rewis v. United States, 401 U.S. 808 (1971)	8
Simpson v. United States, 435 U.S. 6 (1978)	6, 8
United States v. Bass, 404 U.S. 336 (1971)	8
United States v. Patten, 345 F.Supp. 967 (D.P.R. 1972)	7
United States v. Roselli, 432 F.2d 879 (1970), *cert. denied,* 401 U.S. 924 (1971)	7
United States v. Sheridan, 329 U.S. 379 (1946)	6
United States v. Simmons, 414 F.2d 800 (9th Cir. 1969)	11
United States v. Whimpy, 531 F.2d 768 (5th Cir. 1976)	11

Statutes

18 U.S.C.:

Section 641 ..... i, 2, 3, 6, 7
Section 2115 ..... i, 2, 4, 6, 7
Section 2314 ..... i, 2, 4, 6, 7

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STATEMENT OF THE CASE

Petitioner Lance Louis Smith was charged along with four others, Samuel Bailey, William Eggers, Robert Moore and Frank Roza, Jr., in a ten-count indictment filed in the United States District Court for the Northern District of California on March 13, 1979 (C.R 14).[1] Smith was charged in only three of the ten counts. Count three alleged that he, along with Bailey, Eggers and Moore, forcibly broke into the United States post office in Martinez, California, with intent to commit larceny on January 1, 1978 in violation of 18 U.S.C. § 2115. Count four charged that the same four men stole postage stamps, food coupons, and currency valued at approximately $119,000 on the same day at the same place in violation of 18 U.S.C. § 641. In count five, the same men were charged with transporting the same items in interstate commerce from Martinez, California to Nevada, knowing them to have been stolen, in violation of 18 U.S.C. § 2314.

Petitioner was tried by a jury before District Judge Stanley A. Weigel between May 15 and 25, 1979, along with Bailey, Moore and Roza. After having been granted immunity, Eggers testified for the government, and the indictment was dismissed as to him. He testified that he and Bailey entered the Martinez, California, post office by force while Moore and petitioner Smith acted as lookouts. They took postage stamps and food stamps from the post office and immediately thereafter drove to his (Eggers') residence at South Lake Tahoe, California. Peti-

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[1]In this Petition, C.R. refers to the Clerks Record on Appeal and R.T. refers to the Reporter's Transcript on Appeal.

tioner, an alcoholic, then went off and got drunk. The next day Eggers drove Bailey to Carson City, Nevada where the stamps were apparently fenced by Roza (2 R.T. 231, 244, 251-263, 266-268, 271-275). Petitioner took the stand at trial and specifically denied any involvement in the crimes described by Eggers (6 R.T. 968-973).

The jury found petitioner guilty on all three counts (C.R. 200-203). On June 28, 1979, he was sentenced to the custody of the Attorney General for a period of five years on the burglary count, three years on the theft of government property charge, and two years on the interstate transportation count, each of the sentences to run consecutively (C.R. 235, 244). His judgment of conviction was affirmed by the Ninth Circuit Court of Appeals on October 23, 1980 (See Appendix A). He is presently serving his sentence.

STATUTES INVOLVED

18 U.S.C. § 641 reads as follows:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he

shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

18 U.S.C. § 2115 reads as follows:

Whoever forcibly breaks into or attempts to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building or part thereof, so used, any larceny or other depredation, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2314 reads as follows:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's checks bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

REASONS FOR GRANTING THE WRIT

1. **The ruling of the court below that petitioner could stand convicted and consecutively punished for post office burglary, theft of property from inside that post office and interstate transportation of that property conflicts with decisions of this Court which hold that appellate courts must determine whether Congress intended to subject a defendant to multiple prosecutions for a single criminal transaction and, where there is an ambiguity, must resolve doubt in favor of lenity**

Petitioner aided and abetted the breaking and entering of a post office, the theft of stamps therefrom and the getaway from the scene of the crime. Later the stamps were

transported interstate without evidence of petitioner's assistance or his knowledge. The Ninth Circuit affirmed all three judgments of conviction, ruling that there was sufficient evidence to convict petitioner for 18 U.S.C. § 2314 and, relying on *Morgan v. Devine,* 237 U.S. 632 (1915), that the conviction under 18 U.S.C. § 2115 did not merge into the 18 U.S.C. § 641 conviction.

Petitioner's conduct, however, was undeniably a single criminal episode or transaction and the decision of the court below conflicted with this Court's decision in *Simpson v. United States,* 435 U.S. 6 (1978), as it failed to "determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged." *Id.* at 12.

Petitioner suggests that Congress, in enacting 18 U.S.C. § 2314, intended to prosecute offenders for interstate transportation of stolen property *in lieu of* prosecution for such crimes as theft or embezzlement or possessing or receiving that stolen property in situations where federal prosecutors lacked federal jurisdiction to prosecute for those other offenses. There is nothing to indicate that Congress intended to prosecute offenders for interstate transportation *in addition to* federal burglary and theft statutes as was done here, let alone punish offenders consecutively for interstate transportation.

This Court, in discussing the predecessor statute to Section 2314, stated in *United States v. Sheridan,* 329 U.S. 379, 384 (1946), that Congress "contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who

utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent."[2]

Following the logic of the court below, any burglar, robber or thief who carried his stolen property away from the scene of the crime—and this would include virtually every offender as no offender remains at the scene—also could be punished for violating 18 U.S.C. § 2314 as long as his property eventually was transported interstate. This was not the intent of Congress in enacting Section 2314. Congress' intent was to prosecute a class of offenders who had otherwise evaded prosecution—not to pyramid an additional charge upon offenders who were already subject to federal prosecution.

Similarly and notwithstanding *Morgan v. Divine, supra,* decided two-thirds of a century ago, there is no evidence that Congress clearly intended to pyramid punishments for the single criminal transaction of burglary of a post office and theft of property therefrom. A clear legislative intent should be required before courts are permitted to construe Sections 2115 and 641 to authorize consecutive sentencing of a successful post office burglar.

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[2]The Ninth Circuit in *United States v. Roselli,* 432 F.2d 879, 892 (1970), *cert. denied,* 401 U.S. 924 (1971), wrote: "Suppression of movement of the fruits of theft and fraud is only the means to the end of suppressing theft and fraud themselves. The sole reason for conditioning the statutes' prohibitions upon use of interstate commerce is to provide a constitutional basis for the exercise of federal power." See also *United States v. Patten,* 345 F.Supp. 967, 968 (D.P.R. 1972).

At best, Congress' intent with regard to these statutes is ambiguous. Thus, the ruling of the court below conflicts with a long line of decisions of this Court which have held that "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." *Bell v. United States,* 349 U.S. 81, 84 (1955). See also *Simpson v. United States, supra,* 435 U.S. at 15; *Ladner v. United States,* 358 U.S. 169 (1958).

The ruling further conflicts with the Court's oft-repeated rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Simpson, supra,* at 14; *United States v. Bass,* 404 U.S. 336, 347 (1971); *Rewis v. United States,* 401 U.S. 808, 812 (1971). This Court said in *Ladner, supra:* "This policy of lenity means that the Court will interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 358 U.S. at 178.

Petitioner Smith thus respectfully asks this Court to grant his petition and resolve the question of whether Congress intended for punishment under these three federal statutes to be pyramided where the underlying course of conduct and criminal intent is, as here, continuous and indivisible.

2. The prosecutor's repeated violations of the trial court's rulings by deliberately introducing evidence which violated the Bruton rule conflicts with decisions of this Court and the Fifth Circuit and denied petitioner due process of law

At trial, the prosecution indicated its intent to introduce, through the testimony of its final witness, one Namahoe, evidence that co-defendant Bailey had hired Namahoe to murder co-defendant-turned-informant Eggers (See 5 R.T. 719-720). Following a lengthy hearing outside the presence of the jury, the trial court quite properly ruled that this evidence was inadmissible and ordered that Namahoe's testimony be specifically limited to an express admission of guilt by a defendant (6 R.T. 898-901). The court then gave the prosecutor a recess to carefully prepare his examination of Namahoe, avoiding the inadmissible testimony, and to instruct the witness to obey the court's ruling (6 R.T. 904).

Once Namahoe took the stand, the court's ruling was immediately violated by Namahoe's testimony that Bailey had talked about Roza and petitioner Smith (6 R.T. 907-908).

Upon defense counsel's motion, the court ordered the answer stricken, admonished the jury to disregard it, and again suggested the prosecutor elicit admissible evidence "by more careful questions" (6 R.T. 910).

However, instead of obeying, the prosecutor asked Namahoe what Bailey had said to him, and Namahoe responded:

> "Mr. Bailey told me that in part of the indictment he had looked at it that he, Robert Moore, and Bill Eggers have transported the stamps that they took from a burglary into Idaho and that Lannie Smith was not the person who helped them transport it there, and that he felt at that time, after reading that section of the indictment, that Bill Eggers had ratted on them." (6 R.T. 911).

Defense counsel immediately moved to strike the testimony, moved for a mistrial and for a hearing to determine whether the prosecution knowingly elicited that testimony (R.T. 911-912). Judge Weigel denied the latter two motions but did admonish the jury to disregard the testimony (6 R.T. 912).

Later in the day, the court reconsidered the defense request to investigate the prosecutor's prior knowledge of Namahoe's testimony. The prosecutor, Mr. Webb, readily admitted that "I knew the answer he was going to give was going to be given. . . ." (6 R.T. 940). The following also took place:

> The Court: "The question I have in mind for you, Mr. Webb, is, did you have reason to believe that the answer would be as it is now going to be read to you?: "Did you anticipate that answer?"
>
> Mr. Webb: "Yes, your honor."
>
> The Court: "Counsel, I am at a total loss to understand how you could possibly have put the witness on the stand and elicited that answer under the Bruton Rule. I am at a total loss to understand it. You had a strong case, in my opinion, you still have a strong case. What did you do that for?"
>
> Mr. Webb: "I was not thinking." (6 R.T. 941).

The court then instructed the jury to disregard the entire testimony of Namahoe (6 R.T. 944-946).

A long line of cases of this Court have required reversal of a criminal conviction when the trial is infected by the prosecution's introduction of known *false* evidence under the theory that the accused is denied his constitutional right to due process of law.

See, e.g., *Giglio v. United States,* 405 U.S. 150 (1972); *Napue v. Illinois,* 360 U.S. 264 (1959); *Pyle v. Kansas,* 317 U.S. 213 (1942); *Mooney v. Holohan,* 294 U.S. 103 (1935). The prosecution's introduction of known *inadmissible* evidence is equally prejudicial to a defendant and equally violative of his constitutional right to due process of law.

Few cases of *any* federal court have considered this precise problem. The decision in the most analogous case conflicts with the decision below. In *United States v. Whimpy,* 531 F.2d 768 (5th Cir. 1976), before a witness testified, the prosecutor advised the trial court what he would say, but the prosecuter then, as here, either led or allowed the witness to stray into an area which was unquestionably prejudicial to the defendant's case. The court of appeals ruled that the prosecutor erred in conducting the examination in a way which was in direct conflict with the ruling of the trial judge. As the statements and their effect could not be erased by the judge's instruction to disregard the witness' testimony, the appellate court reversed the judgment of conviction. See also *United States v. Simmons,* 414 F.2d 800 (9th Cir. 1969).

Petitioner respectfully requests this Court to grant this petition to resolve this conflict and to consider this important issue in light of the *Giglio* line of cases. Moreover, this is an appropriate case for the Court to exercise its supervisory powers over the administration of criminal justice to examine the prosecutor's conduct in light of the standards set forth in *Berger v. United States,* 295 U.S. 78 (1935), and its progeny.

CONCLUSION

For the foregoing reasons, petitioner respectfully suggests that a writ of certiorari should issue in this case.

Dated: December 19, 1980.

Respectfully submitted,
GOORJIAN & MCCABE

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Attorneys for Petitioner

(Appendices Follow)

Appendix A

In the United States Court of Appeals
For the Ninth Circuit

Nos. 79-1487, 79-1491, 79-1493, 79-1518
D.C. No. CR-79-36-SAW

United States of America,
Plaintiff-Appellee,

vs.

Samuel Gayle Bailey, Lance Louis Smith, Frank Vernon Roza, Jr., Robert Gary Moore,
Defendants-Appellants.

[Filed October 23, 1980]

On Appeal from the United States District Court
for the Northern District of California
The Honorable Stanley A. Weigel, Presiding
Argued and submitted June 10, 1980

Before: ANDERSON and FARRIS, Circuit Judges, and RICHEY,* District Judge.

MEMORANDUM

The defendants appeal their convictions on a multicount indictment for various crimes arising from a series of

*The Honorable Mary Anne Richey, United States District Judge, District of Arizona, sitting by designation.

burglaries of United States Post Offices located at various locations in California and Washington. Bailey was convicted on separate counts of violations of 18 U.S.C. § 1962 (c) (racketeering), 18 U.S.C. § 2115 (postal burglary), 18 U.S.C. § 641 (theft of government property), and 18 U.S.C. § 2314 (interstate transportation of stolen property). Smith was convicted on three counts of postal burglary, theft of government property, and interstate transportation of stolen property. Roza was convicted on two racketeering counts, two transportation of stolen property counts, and one count of receiving stolen property in violation of 18 U.S.C. § 2315. Moore was convicted of racketeering, postal burglary, theft of government property, and transportation of stolen property.

We affirm.

I. CROSS-EXAMINATION OF WITNESS EGGERS

Bailey and Smith raise as potential error the limitation of the cross-examination of chief prosecution witness William Paul Eggers. The trial court did not allow defense counsel to question Eggers regarding certain specific crimes which he might have committed after he began to cooperate with the government in the prosecution which led to the present appeal. Cross-examination of Eggers revealed his unsavory character and his propensity for engaging in criminal activity. The defense attorneys were also allowed to explore possible deals which Eggers may have made with the government for lenient treatment in unrelated investigations.

The scope of cross-examinations is a matter committed to the sound discretion of the trial judge. *E.g., Burr v. Sullivan,* 618 F.2d 583, 587 (9th Cir. 1980). In reviewing a refusal by a trial judge to allow cross-examination on impeachment matters, we look to see whether the jury had sufficient information to appraise the bias and motives of a witness. *Skinner v. Cardwell,* 564 F.2d 1381, 1389 (9th Cir. 1977), *cert. denied,* 435 U.S. 1009, 98 S.Ct. 1883, 56 L.Ed.2d 392 (1978). Defendants here were afforded a sufficient opportunity to probe the bias of Eggers by inquiring into possible understandings with the government on specific charges. Viewing the cross-examination of Eggers as a whole, we observe that the defendants elicited a considerable amount of information which hardly placed the witness in a favorable light. We find that defendants conducted an effective cross-examination of Eggers and were not denied the right to confrontation.

II. BRUTON VIOLATION

Smith, Roza, and Moore urge reversal of their convictions on the ground that the prosecution deliberately elicited testimony from the witness Namahoe which violated the rule of *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Namahoe in substance testified to statements made by Bailey which arguably incriminated the other three defendants. The government concedes that Namahoe's testimony violated *Bruton,* but argues on appeal that the error was harmless beyond a reasonable doubt.[1]

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[1]For the purposes of this appeal, we assume that Namahoe's testimony constituted a denial of the defendants' right to confrontation,

While it is true that every *Bruton* violation does not require reversal, we may affirm a conviction potentially tainted by a *Bruton* error only if the evidence against the defendant is overwhelming and the prejudicial effect of a codefendant's admission is so insignificant by comparison that it is clear that admission of the statement was harmless beyond a reasonable doubt. *See Parker v. Randolph,* 442 U.S. 62, 70, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979); *United States v. Lutz,* 621 F.2d 940, 947 (9th Cir. 1980). Our review of the record indicates that this standard was met as to each of the three objecting defendants. The testimony of witness Escove clearly implicated Roza as the fence for the stolen stamps, as did the presence of the stamps in Roza's Ferrari at the time of his arrest. The testimony of witness Eggers described in minute detail the involvement of Moore and Smith in the burglaries, and the tape-recorded telephone conversations corroborated much of Eggers' testimony. While questions of Eggers' credibility were raised, the jury resolved them in the government's favor.

The defendants, however, have raised an additional problem in connection with the *Bruton* error. It is clear from the record that the Assistant United States Attorney who examined Namahoe knew in advance that the witness would likely allude to statements by Bailey implicating the other defendants. It is also clear that the government had been

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and that the error requires evaluation under the "beyond a reasonable doubt" standard. *See United States v. Castillo,* 615 F.2d 878 (9th Cir. 1980); *United States v. Eaglin,* 571 F.2d 1069 (9th Cir. 1977), *cert. denied,* 435 U.S. 906, 98 S.Ct. 1453, 55 L.Ed.2d 497 (1978).

instructed prior to Namahoe's testimony to confine the evidence only to statements made by Bailey which were admissible against him. The district court held a hearing out of the presence of the jury to determine whether the government had intentionally elicited the *Bruton* violative statements. Government counsel there conceded that he knew of the answer which Namahoe would likely give, and explained that he "was not thinking" and concentrating mainly on steering the witness away from giving testimony implicating the others in an alleged conspiracy to murder the witness Eggers. The trial court accepted counsel's explanation and struck all of Namahoe's testimony, while denying motions for a mistrial. The defendants argue that the government's knowing use of inadmissible evidence requires reversal under the principle of *United States v. Whimpy,* 531 F.2d 768 (5th Cir. 1976). The court below, however, accepted counsel's explanation that the use of the statement was inadvertent and occurred in the course of an effort to avoid the introduction of other inadmissible evidence. In the face of a clear finding by the trial court on counsel's state of mind, we are reluctant to second-guess counsel's motivations on appeal. While we admonish counsel to observe all instructions from the bench and to avoid scrupulously the use of inadmissible evidence, we do not find that government counsel's negligence here requires a reversal. The use of the evidence was not deliberate in the sense that the government hoped to sneak it past inattentive defense counsel.

III. JOINDER AND SEVERANCE

Roza, Moore, and Smith argue that the trial court erred in refusing to grant their motions for severance. Smith challenges the original joinder under Fed. R. Crim. P. 8(b), and all three defendants challenge the failure to grant severance under Fed. R. Crim. P. 14.

A. Original Joinder under Rule 8(b)

Smith argues that his original joinder with the other defendants was improper under Rule 8(b) because he was the only defendant not charged under a RICO count and because a substantial amount of the evidence adduced at trial related to Roza's fencing operation.

Under Rule 8(b), joinder is permissible so long as all defendants participate in a series of acts constituting an offense or offenses, even though not all defendants participated in every act constituting each joined offense. *United States v. Roselli,* 432 F.2d 879, 899 (9th Cir. 1970), *cert. denied,* 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971). The indictment here charged the defendants with an interrelated series of illegal acts of which Roza's fencing operation was an integral part. Furthermore, the evidence at trial indicated that each of the acts charged was a portion of an overall series of illegal transactions. We are satisfied that Smith's participation in the burglary operation was sufficiently related to other acts charged in the indictment to justify joinder under Rule 8(b). No error was committed here.

B. Severance Motions under Rule 14

Each defendant claims error in denial of their severance motions made at various stages of the proceedings. We can overturn the trial court's denial of a severance motion only if the prejudice resulting is of such magnitude that the defendant was denied a fair trial. *See, e.g., United States v. Escalante,* ..... F.2d ....., slip op. p. 2897 (April 29, 1980). We have examined the relevant portions of the record and have found no basis for overturning the trial court's rulings. Each of the defendants has received a fair trial. The court below did not abuse its discretion.

IV. RICO COUNTS

Moore and Roza each seek dismissal of the counts against them arising from alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*

Moore challenges the constitutionality of the definitions of the word "enterprise" contained in § 1961 (4) and the phrase "pattern of racketeering activity" in § 1961 (5). Moore's argument, as is forthrightly conceded in his brief, is foreclosed by our decision in *United States v. Campanale,* 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 638 (1976).

Roza's claim that the statute does not apply to legitimate business enterprises is similarly foreclosed by prior decisions in this circuit. *See United States v. Rone,* 598 F.2d 564 (9th Cir. 1979), *cert. denied,* ..... U.S. ....., 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980); *United States v. Campanale, supra,* at 364. Roza also contends that the evidence was insufficient

to sustain a conviction under RICO. Roza's knowledge that the stamps were stolen and his activities as the gang's fence are well documented in the record.

We affirm each of the convictions under RICO.

V. WARRANTLESS SEIZURE OF ROZA'S FERRARI

Roza challenges the constitutionality of the seizure of his Ferrari in the Sacramento hotel parking lot. The postal inspectors who arrested Roza impounded the automobile and later searched it pursuant to a search warrant. At the time that Roza was arrested, he was several hundred feet away from the automobile, and it was legally parked in a public lot. The inspectors impounded the car, acting upon the tip of informant Escove, who had been told by Roza that some $30,000 worth of stamps were located in the trunk.

This court upheld the warrantless search of an automobile under nearly identical circumstances in *United States v. McClain*, 531 F.2d 431 (9th Cir.), *cert. denied*, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976). Here, probable cause was provided by Escove's tip. Circumstances were sufficiently exigent in that an accomplice could well have moved the automobile or removed the stamps. The action of the inspectors in securing the automobile pending issuance of a search warrant was entirely proper.[2]

. . [2]Cases cited by Roza are inapposite. *United States v. Hellman*, 556 F.2d 442 (9th Cir. 1977), involved a warrantless inventory search with no probable cause. *Ramon v. Cupp*, 423 F.2d 248 (9th Cir. 1970), was predicated upon a warrantless search following impoundment after all possible exigencies had been precluded.

VI. FORFEITURE OF THE FERRARI

The jury returned a verdict of forfeiture against Roza's Ferrari pursuant to 18 U.S.C. § 1963 (a)(1). The evidence showed that Consolidated Coin Company was the depository of funds which Roza had received from fencing the stolen stamps, and that the Ferrari was purchased with a $35,000 check drawn on Consolidated Coin's account. Roza challenges the sufficiency of this evidence to support a verdict of forfeiture. The evidence was sufficient to demonstrate that Consolidated Coin was an enterprise conducted in violation of RICO. Because the Ferrari was purchased with funds on deposit with Consolidated Coin, the jury could properly find that it was an asset of Consolidated Coin, even though purchased in the name of another. The evidence therefore was sufficient to support the jury's verdict of forfeiture.

VII. LIMITATION ON CROSS-EXAMINATION OF THE WITNESS ESCOVE

Roza's claim that his ability to cross-examine the witness Joseph Escove was improperly limited is not supported by the record. Escove provided the names of several dealers to whom he had sold the stolen stamps before he announced his intention to name no others without an order from the court. The trial court sustained the prosecution's objection to further inquiry on relevancy grounds, but left the matter open for Roza's counsel to develop later in the trial. Counsel did not avail himself of the opportunity to reopen the issue. Roza's argument as to the possible relevancy of the testimony sought is speculative and contradicted by Escove's direct testimony which

quite clearly identified Roza as the source of the stolen postage stamps. The trial court's ruling on the Escove testimony was not in error.

VIII. SUFFICIENCY OF THE EVIDENCE

Smith challenges the sufficiency of the evidence to support his conviction under count five of the indictment for causing the postage stamps stolen from the Martinez, California, post office to be transported in interstate commerce in violation of 18 U.S.C. § 2314. Smith attacks the evidence on two grounds: (1) there is no evidence that Smith physically "caused" the stamps to be transported across state lines, and (2) there is no evidence that Smith knew that the stamps were to be transported in interstate commerce.

Neither an intention to use interstate facilities nor knowledge that they will be used is an element of a § 2314 offense. *See, e.g., United States v. Masters*, 456 F.2d 1060, 1061 (9th Cir. 1972). Smith's lack of knowledge that the stamps were to be transported across state lines is therefore irrelevant. The test for causation under § 2314 is whether interstate transportation of stolen goods was a reasonably foreseeable consequence of the defendant's actions. *Masters, supra.*

The evidence showed that Smith aided in the transportation of the stamps from the scene of the burglary to Eggers' home in South Lake Tahoe. After unloading and inventorying the stamps, the defendants reloaded the stamps into Bailey's car, after being informed that Bailey intended to take them to his fence. The movement of the stolen stamps across state lines was thus a reasonably

foreseeable consequence of Smith's participation in the burglary and transporting of the stamps to South Lake Tahoe. Viewing the evidence in the light most favorable to the government, we cannot say that it was insufficient to convict Smith on count five of the indictment.

IX. MERGER OF OFFENSES

Smith raises the issue whether his conviction for postal burglary under 18 U.S.C. § 2115 merges into his conviction for theft of government property under 18 U.S.C. § 641. We find that each statute describes a separate offense, and that each contains an element which the other does not. § 2115 requires that forcible entry of a post office be proven; under § 641, forcible entry need not necessarily be proven. § 641 requires proof of theft while § 2115 does not. *See Clemas v. United States,* 423 F.2d 461 (8th Cir.), *cert. denied,* 398 U.S. 968, 90 S.Ct. 2183, 26 L.Ed.2d 554 (1970). The Supreme Court reached a similar conclusion under a pair of older postal burglary and theft statutes. *See Morgan v. Devine,* 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153 (1915); *see also Prince v. United States,* 352 U.S. 322, 328, n.9, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957). It was not error to punish Smith for the separate violations.

X. PRIOR CRIME EVIDENCE

We assume without deciding that the court erred in allowing Eggers to testify as to Smith's prior burglaries with Ed Witwick. *See* Fed. R. Evid. 404(b). We agree with the government, however, that any error here was harmless beyond a reasonable doubt. The evidence of Smith's guilt was overwhelming, and the reference to the previous

burglaries brief and general. The government did not refer to this evidence in its closing argument.

XI. SANDSTROM VIOLATION

Finally, Smith asserts that the jury instruction on inferring intent violates the Supreme Court's decision in *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). This court, however, has recently approved in a post-*Sandstrom* decision an instruction virtually identical to that challenged here. *See United States v. Ross,* F.2d , slip. op. p. 3807 (9th Cir., June 19, 1980). The instruction did not amount to reversible error.

The judgment of the trial court and conviction of each of the defendants is

AFFIRMED.